

1 five and come back tomorrow, which is the 28th. I  
2 will start things at 9:30 and be finished by 11. I  
3 will get to you-all at 11:00 if we don't finish before  
4 then.

5 MR. ROBERTSON: Your Honor, before we get  
6 started, can I just make one point of clarification  
7 just for fairness?

8 In response to the last argument, the Court  
9 had suggested that we should have submitted --  
10 incorporated our rebuttal expert report in this  
11 interrogatory concerning the commercial success of the  
12 infringing product.

13 Where we do reference that is in Mr. Brooks  
14 Hilliard's report. We didn't have the report with us  
15 today. I apologize for that, but I didn't know that  
16 that was going to be the basis of the argument.

17 THE COURT: I didn't say that. I said you  
18 can't incorporate an after-filed report just like  
19 Shamos can't.

20 MR. ROBERTSON: Let me just -- we didn't have  
21 the report. In fact, we just received their  
22 invalidity report. We had until June 9 to rebut it,  
23 so there was no way I could submit a report on May 18.

24 THE COURT: So, then they didn't even have  
25 the answer that you had purported to incorporate by

1 that time. You didn't even know what he was going to  
2 say. So that's even worse.

3 Just for the record on this issue, this is an  
4 issue that deals with Rule 37 sanctions, and the  
5 Southern States format calls for analysis, and the  
6 analysis is that the plaintiff is surprised and  
7 prejudiced. There's no way really to cure it. And  
8 it's on an important matter, and it's a fairly  
9 significant piece of evidence. And the balance under  
10 the Southern States Rambus test calls for preclusion  
11 of the testimony.

12 All right. No. 15, rebuttal exhibits for  
13 impeachment purposes now.

14 MR. SCHULTZ: Your Honor, I note that these  
15 documents, the headline here, is for impeachment  
16 purposes.

17 THE COURT: They can use what they need for  
18 impeachment. They don't always know what people are  
19 going to say. We haven't gotten that refined yet.

20 MR. SCHULTZ: It's our position, Your Honor,  
21 that if these are used for impeachment purposes, if  
22 the witness is going astray, fine, but they shouldn't  
23 be admitted as exhibits that go back to the jury.

24 THE COURT: They ordinarily don't go back to  
25 the jury. But it sort of depends on what -- I mean,

1 impeachment testimony doesn't go back to the jury, but  
2 it can be, for example, if somebody doesn't  
3 acknowledge what's in an exhibit, there are occasions  
4 when the exhibit goes back to the jury on an  
5 impeachment issue. It just sort of depends on how it  
6 happens. I suggest we deal with that if and when it  
7 happens.

8 MR. SCHULTZ: We agree.

9 THE COURT: Okay. Good. So that takes care  
10 of all of the Lawson exhibits, right? I mean Lawson's  
11 objections to ePlus's exhibits?

12 MR. McDONALD: We're both standing up at the  
13 same time. We talked over the break. There are two  
14 exhibits, Plaintiff's Exhibit 40 and Plaintiff's  
15 Exhibit 344, that I think were listed in the pretrial  
16 order as objected to but plaintiff has withdrawn them.

17 MS. ALBERT: That's correct, Your Honor. The  
18 plaintiff withdraws PX 40 and PX 344.

19 THE COURT: Okay. What heading, what topic  
20 are they under?

21 MS. ALBERT: They were not included in that  
22 outline because we had withdrawn them, but  
23 inadvertently in the appendices to the pretrial order  
24 they are still reflected in the appendix.

25 THE COURT: Okay. Well, this outline has my

1 rulings on it, and it will be attached to your  
2 appendix on that, and it will become the ruling  
3 because I'm not going to retranscribe them here. So  
4 this Appendix 3 now will have to it Appendix 3A, which  
5 will be the controlling document. Does that help you  
6 all?

7 MS. ALBERT: Yes, Your Honor.

8 THE COURT: You'll get a copy of all this.  
9 Okay.

10 I guess it's actually Appendix 4A. Appendix  
11 3 is exhibits to which there are no objections to. So  
12 it will be Appendix 4A.

13 Okay. Appendix 5 is exhibits as to which  
14 there are no objections; is that right?

15 Appendix 6 is exhibits as to which there are  
16 objections, right?

17 MS. STOLL-DeBELL: Yes.

18 THE COURT: Do you all have one of those  
19 little outlines for me or do I use Appendix 6?

20 MS. STOLL DeBELL: Your Honor, there are not  
21 very many for Lawson. And, actually, we're going to  
22 withdraw DX 56.

23 THE COURT: Hold on. Okay. DX 56, exhibit  
24 withdrawn.

25 Now I need the Lawson exhibits. We can get

1 rid of these and get the Lawson exhibits. Does  
2 somebody want to get to work over here so I can see  
3 them?

4 I don't want those big, long exhibits.  
5 Lawson, come up and get yours. Do some weightlifting.  
6 I mean ePlus. Come up and get yours.

7 Okay. So what I need is the volumes that  
8 have 97, 98, 111, 112, 121, 122, 123, 36, 37, 291  
9 and -- I guess I need them all because they are all  
10 over the ballpark the way you have them ordered, I  
11 see.

12 How many do you have?

13 MR. CARR: I think it's going to be just a  
14 few binders. Those two binders have everything.

15 THE COURT: So you're only going to do the  
16 first page? Is that what you're talking about? Is  
17 that all you've got?

18 MS. STOLL-DeBELL: No. 371 on the last page  
19 and 291 on the last page.

20 THE COURT: Look here at what I've got. I've  
21 got three pages of objections. It's on Appendix 6.  
22 Is this the list? That's what I'm working with. Take  
23 a look at it and see.

24 MR. STRAPP: Pages 2 and 3 of the list of  
25 objections are objections as to which Lawson agrees

1 the exhibits have already been agreed by court order.

2 THE COURT: So all that's left is the one  
3 page?

4 MS. STOLL-DeBELL: Yes, sir.

5 THE COURT: Thank you, ma'am.

6 Okay. I guess we start with 97 and 98.

7 MS. ALBERT: DX 97 and DX 98 are related  
8 issues. They are manuals that relate to this J CONN  
9 prior art, alleged prior art system.

10 I am going to withdraw our Rule 26 objections  
11 to both of those. But these should be excluded per  
12 your order on ePlus' motion in limine No. 2 as they  
13 were not cited in Lawson's second supplemental  
14 invalidity contentions.

15 MS. STOLL-DeBELL: Your Honor, I believe you  
16 reserved judgment on this issue as to these specific  
17 manuals, and that is because we argued that -- and I  
18 can pull up your order on that. So you granted their  
19 motion to strike.

20 These J CONN manuals are -- I think we've  
21 heard a number of times today that the parties can use  
22 additional evidence in support of arguments that were  
23 disclosed. And that's what this falls under. These  
24 are some additional J CONN manuals relating to the J  
25 CONN prior art system that we did disclose in our

1 second supplemental invalidity contentions.

2 THE COURT: What does the order say on motion  
3 in limine No. 2?

4 MS. ALBERT: The order says that for the  
5 reasons set forth on the record, plaintiff's motion in  
6 limine No. 2 to enforce the Court's prior orders of  
7 May 24, 2010, and May 25, 2010, and exclude any expert  
8 opinion, other testimony or argument pertaining to  
9 alleged prior art and invalidity theories not set  
10 forth in the defendant's court ordered second  
11 supplemental statement is granted.

12 As to both these two documents, they are not  
13 disclosed in the second supplemental invalidity  
14 contentions. So this is about the fourth bite at the  
15 apple for arguing to get in evidence that the Court  
16 excluded three times already.

17 THE COURT: I think at one point in time I  
18 did reserve judgment on something, but I also thought  
19 that that order subsequently took care of the  
20 reservation of judgment, but I have to say I'm not  
21 sure about that. So --

22 MS. STOLL-DeBELL: Your Honor, in your order,  
23 Docket No. 230, that was your order on their motion to  
24 strike certain things from Dr. Shamos' report.

25 THE COURT: What was that? The thing she

1 just read?

2 MS. ALBERT: This is the order on motion in  
3 limine No. 2, which was --

4 THE COURT: After that.

5 MS. ALBERT: Was after that. Subsequent.

6 THE COURT: In other words, I did something  
7 on the motion to strike. I said I'm going to hold it  
8 in abeyance until I understand more. Then I got the  
9 motion in limine, and I ruled on the motion in limine,  
10 and I kept it out, I think. But I'm not sure that's  
11 right. And you're shaking your head no. And you-all  
12 are much closer to it than I am.

13 MS. STOLL-DeBELL: Your Honor, I think we  
14 argued it, and I argued again that this is not new  
15 prior art reference. We disclosed J CONN. The J CONN  
16 system. It's the second supplemental invalidity  
17 statement. I can hand it up and show you. We said  
18 we're going to rely on the J CONN system as prior art.

19 Now, we did not cite those specific documents  
20 in the second supplemental invalidity statement, but  
21 they are J CONN manuals. They are just additional  
22 evidence in support of an argument that was properly  
23 and fully disclosed. It's the same thing as what  
24 Dr. Weaver -- he had a whole bunch of additional  
25 evidence. Your Honor looked at it and said it's just



1 additional evidence in support --

2 THE COURT: Of the same disclosed theory.

3 MS. STOLL-DeBELL: This is the same issue.

4 We've always said J CONN is a system we're relying on.

5 And these are J CONN manuals.

6 MS. ALBERT: Your Honor, Dr. Shamos, their  
7 expert, doesn't even rely on these two manuals for any  
8 opinions, nor are they in the second supplemental  
9 invalidity contentions. So how are we properly on  
10 notice of these documents?

11 THE COURT: Wait a minute. They're not in  
12 there, but the J CONN is identified as prior art,  
13 right?

14 MS. STOLL-DeBELL: Yes, Your Honor.

15 THE COURT: In the second supplemental  
16 contentions?

17 MS. STOLL-DeBELL: Yes, the J CONN system.  
18 Actually, Dr. Shamos cites to the manual we cited in  
19 the second supplemental in support of J CONN plus  
20 these two. But they are all J CONN manuals. We've  
21 always said from the very beginning of time we're  
22 going to rely on J CONN. These are just additional  
23 evidence.

24 And plaintiff's Dr. Weaver is allowed to rely  
25 on additional evidence, and Dr. Shamos should, too.

1 They know J CONN is in this case. It's always been in  
2 this case. There's no surprise here.

3 MS. ALBERT: He hasn't disclosed any opinions  
4 regarding these two documents.

5 THE COURT: What does he say about these  
6 documents?

7 MS. STOLL-DeBELL: I can bring up a printed  
8 copy of his claim chart where he cites to them if  
9 you'd like, Your Honor.

10 THE COURT: Show them to her.

11 MS. ALBERT: Can you point to a page?

12 THE COURT: What she's doing now is she's  
13 walking.

14 MS. STOLL-DeBELL: Can I hand up --

15 THE COURT: Okay.

16 MS. STOLL-DeBELL: Your Honor, if you'll give  
17 me just a minute to look it up.

18 THE COURT: Okay.

19 MS. STOLL-DeBELL: I didn't realize they were  
20 saying this wasn't cited.

21 THE COURT: The more I think about it, the  
22 more what I reserved judgment on was very early in the  
23 process, and these motions in limine came after that,  
24 and we're on a more specific briefing of what I had  
25 reserved judgment on, but I just don't have a

1 recollection beyond that.

2 MR. ROBERTSON: May I make a suggestion then?  
3 Why don't we reserve on this and show you the  
4 transcript where you specifically ruled on that when  
5 you granted motion in limine No. 2, which is quite  
6 specific, that nothing further can come in if it  
7 wasn't in the second supplemental. I feel like we've  
8 fought this battle four times now.

9 THE COURT: Wait a minute. So has she.

10 MR. ROBERTSON: I know, but Your Honor has  
11 ruled three times.

12 THE COURT: I know, but the fourth time is a  
13 charm.

14 MR. ROBERTSON: Well, your Honor, then I have  
15 a few ones I'd like to reopen, like the damages issue.

16 MS. STOLL-DeBELL: Well, let's open  
17 Dr. Shamos' invalidity contention, too.

18 MR. ROBERTSON: Let's have some closure, Your  
19 Honor.

20 THE COURT: I've got a better idea. Why  
21 don't we dismiss this case without prejudice. Let you  
22 refile it and start all over again. All right.

23 MS. ALBERT: Your Honor, I thought that your  
24 ruling on the original motion going back to what  
25 Dr. Shamos can testify about is only prior art that

1 was disclosed in the second supplemental invalidity  
2 contentions.

3 They are conceding that these two documents  
4 are not disclosed in the second supplemental --

5 THE COURT: I think she actually is not  
6 conceding that. I think she's saying they are  
7 disclosed.

8 MS. STOLL-DeBELL: I said the J CONN system  
9 was disclosed as prior art in our second supplemental.  
10 These two specific documents were not cited, but J  
11 CONN as a system was.

12 THE COURT: It is cited in Shamos's report?

13 MS. STOLL-DeBELL: It is. So if you look at  
14 page 1, if you go to the P.O. Writer, J CONN tab, page  
15 1.

16 THE COURT: The '172 patent?

17 MS. STOLL-DeBELL: Yes, Your Honor. You will  
18 see there are sort of column headings that are  
19 letters, and then row headings that are numbers. So  
20 if you go to that green column, it's column S, row 15.  
21 It says, "Shamos Opinion Re: J CONN." And there are  
22 some folks from different manuals.

23 The last two there like the last one is  
24 125142. I believe that is Exhibit 98.

25 THE COURT: What about 97?

1 MS. STOLL-DeBELL: I can find a cite for  
2 that. It's in here. I think the one before it is --  
3 if you go to the next page, page 2, Your Honor, column  
4 S, line 17.

5 THE COURT: Yes.

6 MS. STOLL-DeBELL: I'm sorry. I think I have  
7 slight dyslexia. Hold on. I'll find it.

8 THE COURT: Here's what we're going to do on  
9 this. I want to make sure I get it right. We file a  
10 briefing on the same schedule as the other briefing we  
11 did, whatever those dates were. And let's see. These  
12 are your objections, right?

13 MS. ALBERT: Yes, sir.

14 THE COURT: You go first. You respond. You  
15 go second.

16 I think what we may be talking about here  
17 is that -- I'm wondering whether what we're talking  
18 about is whether I had the Shamos report when I made  
19 the ruling, and I said these things weren't disclosed  
20 originally, and that's why they couldn't come in.  
21 These contentions weren't.

22 And I believe that, as I'm reflecting upon  
23 it, there was something substantively -- it wasn't  
24 just that the evidence wasn't disclosed, it was that  
25 it was a new substantive theory that was being raised

1 by virtue of these references, and I believe that's  
2 what I was keeping out.

3 I do believe this, though, that if your  
4 expert is permitted, Weaver, to cite in support of  
5 your contentions on infringement evidence, ePlus, that  
6 wasn't cited in the infringement contentions, but  
7 support theories that were disclosed, then the same  
8 rule has to apply to them.

9 And if that's where we are, then I may have  
10 made a mistake, and if I did, I'm going to correct it.  
11 That's the way it is. Because that rule has to apply  
12 both ways.

13 MR. ROBERTSON: I understand, Your Honor.  
14 But you have to remember that these two situations  
15 were very different procedural postures because  
16 Weaver, you ruled in their motion in limine, did  
17 adequately disclose early on in December all of his  
18 theories and with numerous exhibits. But you then  
19 said the discovery proceed for another five months,  
20 and he was permitted to do that.

21 Very different situation. They didn't  
22 adequately disclose their invalidity contentions. You  
23 ordered them as a result of motion practice to do the  
24 second supplemental statement.

25 Then, Your Honor, they filed the Shamos

1 report. And we filed a motion with respect to the  
2 Shamos report. You ruled then that it was going to be  
3 confined to the second supplemental. Then they  
4 continued to try to add additional exhibits, and we  
5 brought the motion in limine. So they are very  
6 different procedural postures.

7 THE COURT: I'm sure you'll synthesize all  
8 that for me.

9 MR. ROBERTSON: Because it does apply to a  
10 number of these exhibits that we have objections to.

11 THE COURT: I understand.

12 MR. ROBERTSON: You might want to reserve on  
13 those until we can document for Your Honor. And if I  
14 might be permitted, I'd like to be able to quote Judge  
15 Payne on Judge Payne from that last hearing when you  
16 rather express as to what you were ruling and the  
17 reason for it.

18 THE COURT: That's always a dangerous thing  
19 to do. But the bottom line here is that we really  
20 have to do what's right. And if I made a mistake, I'm  
21 going to try to correct it here. If I blew it, I've  
22 got to get it right as best I can. I don't proclaim  
23 to be infallible, and I know you-all are going to try  
24 to add to that reputation if it goes up on appeal. So  
25 that's okay. But I'd like to do what I can to save

1 the Federal Circuit trouble. All right. Let's go.

2 MS. STOLL-DeBELL: So I think those will be  
3 reserved. Again, it's our position that it's  
4 additional evidence in favor of an old theory. And I  
5 think that's what you said at the hearing.

6 But moving on, so that's 97 and 98.

7 THE COURT: 97 and 98 are reserved on the  
8 motion in limine issue. On the Rule 26 issue it's  
9 withdrawn by the plaintiff. Right?

10 MS. STOLL-DeBELL: Right.

11 THE COURT: Okay.

12 MS. ALBERT: DX 111.

13 THE COURT: By the way, put these things in  
14 separate briefs. Don't put them in the same brief.  
15 We're doing briefing, and whoever has the burden gets  
16 to go on the first date, but keep them separately so  
17 we can deal with them separately.

18 All right. Yes, ma'am. 111 and 12.

19 MS. ALBERT: DX 111 relates to a document  
20 concerning this IBM Technical Viewer 2 product, which  
21 if Your Honor would recall, Lawson contends that the  
22 combination of the inventor's prior RIMS system, plus  
23 the Technical Viewer 2 allegedly invalidates some of  
24 the claims. DX 111 actually is not relevant because  
25 it postdates the priority date of the patents, which



1 is August 10, 1994. And DX 111 is dated after  
2 November of 1994. So it can't be relevant to prior  
3 art because it doesn't reflect anything that is prior  
4 in time to the priority date of the patents-in-suit.

5 Additionally, we have an objection under Rule  
6 403 that it would be misleading and confusing to the  
7 jury and confusing the jury as to the functionality of  
8 the TV2 product when the functionality that's  
9 described in the document postdates the priority date  
10 of the patents-in-suit. So it reflects subsequent  
11 functionality, not alleged prior functionality.

12 THE COURT: That would be confusing.

13 MS. ALBERT: Correct.

14 THE COURT: Okay.

15 MR. SCHULTZ: The document does have a 1994  
16 date on it; however, it discusses the creation date of  
17 1992 of the document.

18 THE COURT: Where?

19 MR. SCHULTZ: First page, middle of the page,  
20 it says, "created" right under RPQ number.

21 MS. ALBERT: Your Honor --

22 THE COURT: Wait a minute. Okay. I see.  
23 Created 1992-03-30. Revised 1994-11-23. So this  
24 document, it reflects a revision in '94 even though it  
25 was originally created in '93. Do you agree with

1 that?

2 MR. SCHULTZ: Yes.

3 THE COURT: If the revision, if the part that  
4 was revised, is the alleged prior art, then it can't  
5 be prior art. Is that your point?

6 MS. ALBERT: Yes, my point is --

7 THE COURT: All right. Where is the --  
8 excuse me. Go ahead. Finish what you were saying.

9 MS. ALBERT: Well, it says at the very top of  
10 the document that it's withdrawn effective 1994-11-23.  
11 Discontinued effective 1994-11-23. So, obviously, the  
12 document on its face postdates the priority date of  
13 the patents-in-suit.

14 THE COURT: What's the priority date?

15 MS. ALBERT: August 10, 1994.

16 THE COURT: Well, but I guess your point is  
17 if what was in there as of '92 then, that doesn't  
18 postdate it; is that right?

19 MR. SCHULTZ: That's correct.

20 THE COURT: So the issue is what is the text  
21 we're talking about, and how do we know what was  
22 extant in '92 and what was added in '94.

23 MR. SCHULTZ: The document, if you look to  
24 page 6 of 6.

25 THE COURT: Six?

1 MR. SCHULTZ: Yes. Has the announce date of  
2 1992, March 30. And it goes through the dates. And,  
3 further, we're going to have Mr. Chuck Gounaris, who  
4 is going to testify to this document, and he can go  
5 through the iterations --

6 THE COURT: I know you know what you're  
7 talking about, but I don't have the background that  
8 you do. So show me where the date is that you're  
9 talking about.

10 MR. SCHULTZ: Yes. Page 6 at the bottom  
11 where it says, "Additional information."

12 THE COURT: Yes.

13 MR. SCHULTZ: It goes through the dates of  
14 the software.

15 THE COURT: It says the announce date was  
16 3-30-92. That's the availability date. And the  
17 withdrawal date was 1994, right?

18 MR. SCHULTZ: That's correct.

19 THE COURT: So doesn't that show that this  
20 was extant as of the priority date of 8-10-94 or not?

21 MS. ALBERT: It does not show that.

22 THE COURT: Why not?

23 MS. ALBERT: Because the TV2 product was  
24 modified. This document reflects on its face that it  
25 was modified over time, and this is a postdate --

1 THE COURT: How does it do that other than of  
2 the dates we're talking about?

3 MS. ALBERT: Well, the part that Mr. Schultz  
4 just referred you to. And --

5 THE COURT: No, wait a minute. Let's get  
6 this right here. As I read this, it says what's in  
7 here it came into existence in 1992 and was available  
8 then. And it stayed that way until 1994 when it was  
9 withdrawn.

10 To me, that says it was, if it qualifies  
11 otherwise as being art that's pertinent, and it was  
12 art that was pertinent before 1994, or it would be  
13 before 1994 August 10 because it was in effect as of  
14 March of 1992. Now, what's wrong with that analysis?

15 MS. ALBERT: Respectfully, Your Honor, you're  
16 going to hear testimony from multiple witnesses. The  
17 inventors, Mr. Gounaris, who Mr. Schultz referred to,  
18 Ms. Eng, they all testified that there were  
19 modifications that were made to the TV2 product  
20 specifically for this project for Fisher-Scientific to  
21 come up with the patented systems. And that activity  
22 took place in 1993 and 1994.

23 So I don't see how a document that's dated in  
24 November of 1994 reflects functionality of a product  
25 prior to the time that the IBM folks started working

1 with Fisher-Scientific to come up with the patented  
2 systems. There's nothing in the document that says  
3 TV2 had this functionality in 1992.

4 THE COURT: No, but what it says is -- to me  
5 it says this was the way it was until 1994. There  
6 were no other revisions, and it was withdrawn in 1994  
7 and discontinued. So it establishes on its face that  
8 this was the way it was 1992 to 1994. And if this is  
9 consistent with the methodology of issuing regulations  
10 and changes generally in places that do that, it would  
11 seem to me to be supported by a general understanding  
12 that that's what this means.

13 MS. ALBERT: On page 6 of 6.

14 THE COURT: Right.

15 MS. ALBERT: Above the section that  
16 Mr. Schultz referred you to.

17 THE COURT: Right.

18 MS. ALBERT: It says, "Revision No. 5."

19 THE COURT: Uh-huh.

20 MS. ALBERT: Reflecting that this is the  
21 fifth iteration of the product. So it was not static  
22 over time from 1991 or 1992 through 1994.

23 THE COURT: I see. And you say there's other  
24 evidence that the people who worked on these changes  
25 are going to establish that they did so in '93 and

1 '94?

2 MS. ALBERT: That's correct.

3 THE COURT: I mean '93 and '94.

4 MS. ALBERT: Correct.

5 THE COURT: Okay. It looks to me like she's  
6 got a point there if it's the fifth revision and  
7 there's testimony to that effect. I don't see how  
8 this could come in without testimony establishing its  
9 bona fides. You can't make that decision from the  
10 face of it.

11 MR. SCHULTZ: There will be testimony from  
12 Mr. Chuck Gounaris, who will testify as to this  
13 document and will testify to any iterations that took  
14 place and --

15 THE COURT: Well, I'm going to reserve until  
16 you get a foundation because you need a foundation on  
17 this. It won't fly on its own.

18 112.

19 MS. ALBERT: 112 is a video exhibit relating  
20 to this Technical Viewer 2 System. We have an  
21 objection based on ePlus' motion in limine No. 2 and  
22 your order that this specific document was not  
23 disclosed in the second supplemental invalidity  
24 contentions per your order, and, therefore, it's  
25 excluded under your ruling on ePlus' motion in limine

1 No. 2.

2 THE COURT: Okay. So that's reserved for  
3 your briefing. It's the same as the earlier one in  
4 '97 and '98.

5 MS. ALBERT: In addition, we have an  
6 objection. This one is not disclosed in Dr. Shamos'  
7 report, nor is it disclosed in response to -- we had a  
8 contention interrogatory that we served on Lawson.  
9 Interrogatory No. 9, which I can hand up to you. It  
10 asked that Lawson describe in detail all facts and  
11 identify all documents that Lawson contends support or  
12 tend to support its defenses, affirmative defenses,  
13 and counterclaims, if any, in this action.

14 They cited to some specific documents  
15 relating to IBM TV2, but they did not cite to this  
16 particular one.

17 THE COURT: You mean the video. They didn't  
18 cite to the video.

19 MS. ALBERT: So we have an objection based on  
20 Rule 26 on this. And we also have a relevancy  
21 objection since it hasn't been disclosed or cited in  
22 any expert report, interrogatory answer, or the second  
23 supplemental invalidity contentions.

24 MR. SCHULTZ: Let me start with the relevancy  
25 objection, Your Honor. It goes to TV2. It's further

1 support with respect to the documents that were set  
2 forth in the invalidity contentions. Essentially,  
3 what it has is screen shots within it that are the  
4 same as are in the brochure that is cited in the  
5 invalidity contentions.

6 Your Honor, it is not by itself by Bates  
7 number cited in the invalidity contentions; however,  
8 as we've already had discussion on, TV2 System has  
9 been cited. It's been gone through in depth, and this  
10 is further support of the TV2 reference.

11 MS. ALBERT: Also, respectfully, Your Honor,  
12 this particular document is undated. So there's no --  
13 or the video is undated. So there's no way to really  
14 corroborate that it is indeed prior art.

15 MR. SCHULTZ: Your Honor, there is evidence  
16 of that. I can pull out the testimony from the SAP  
17 trial. We'll have the testimony of Pamela Eng, who is  
18 actually in the video and helped create the video.  
19 She actually was pregnant after the time that the  
20 video was created, and she can date the video based on  
21 that that it was made in 1992 or before. So, yes, we  
22 have the evidence and the corroboration with respect  
23 to the prior art aspect of the video.

24 MS. ALBERT: Your Honor, naked testimony  
25 cannot be used as corroboration.



1 MR. SCHULTZ: Your Honor, there's other  
2 documents that further corroborate the fact that the  
3 video was dated prior to 1992 including the 1991  
4 brochure and general information manual with respect  
5 to the TV2 System.

6 Ms. Eng by herself was selling this system at  
7 trade shows throughout the United States. She can  
8 testify there is corroborating evidence. The  
9 objection has no merit.

10 MS. ALBERT: Well, I mean, he hasn't  
11 addressed by Rule 26 objection that it wasn't cited in  
12 response to a contention interrogatory.

13 MR. SCHULTZ: Your Honor, I did address that  
14 issue. That by its reference, by its Bates number was  
15 not included there; however, the TV2 reference was.  
16 ePlus was on notice of the TV2 System and it goes to  
17 the same issue that we've already addressed.

18 THE COURT: So the issue is being reserved  
19 and there's going to be briefing.

20 MR. SCHULTZ: Correct.

21 MS. ALBERT: Well, we have a specific  
22 contention interrogatory that asked that you identify  
23 every document that you had relied on to support your  
24 affirmative defenses. You have a listing of documents  
25 about TV2, and it does not include this document. And

1 I can hand that up to the Court.

2 THE COURT: I don't need to. It seems to me  
3 he doesn't dispute that. He said it wasn't in there.  
4 So the question is: Are you surprised? Are you  
5 prejudiced? Can it be cured? Is there a problem  
6 applying the Southern States analysis?

7 MS. ALBERT: We are surprised.

8 THE COURT: How is it going to foul up the  
9 trial? How are you surprised?

10 MS. ALBERT: Well --

11 THE COURT: Given that you knew everything --  
12 you knew everything he's talking about, he says, about  
13 Ms. Eng, and about the system. So how are you  
14 surprised, I guess, is the question.

15 MS. ALBERT: It wasn't disclosed anywhere.

16 THE COURT: I know.

17 MS. ALBERT: Not in the contention  
18 interrogatories, not in the second supplemental  
19 invalidity contentions that Your Honor ordered that  
20 they disclose everything that they would rely on,  
21 their invalidity positions. It wasn't relied on by  
22 Dr. Shamos, and our expert didn't have an opportunity  
23 to rebut this particular exhibit because it was never  
24 disclosed to us that they intended to rely on it.

25 MR. SCHULTZ: Your Honor, it's the same

1 expert that they had in the SAP trial. It's fully  
2 disclosed that the TV2 System is a piece of prior art  
3 that Lawson is relying upon in this case.

4 THE COURT: Was this same issue litigated in  
5 the SAP trial?

6 MR. SCHULTZ: It was.

7 THE COURT: So how are you surprised? If you  
8 have tried it once, you can't really be surprised.  
9 And you can cure the surprise because you know how to  
10 deal with it. So how is it going to foul up the  
11 trial? Just get your guy to testify about it. Is it  
12 the same expert you had in the SAP trial or a  
13 different one?

14 MS. ALBERT: It's the same expert, but the  
15 issue of obviousness of RIMS and TV2 was not actually  
16 before the jury in the SAP case.

17 THE COURT: They didn't testify about that?

18 MS. ALBERT: Right.

19 THE COURT: All right. It seems to me as if  
20 you were asked to disclose those things in a  
21 contention interrogatory and you didn't. And you  
22 admittedly didn't. And while they had some general  
23 knowledge about Ms. Eng and what she did and about the  
24 viewer, this particular piece of evidence is different  
25 than the other evidence that they were told about and

1 that you were going to use.

2 Now, tell me this: What's different about  
3 this video than what they already knew?

4 MR. SCHULTZ: There's really nothing that's  
5 different.

6 THE COURT: Well, why isn't it cumulative?  
7 Why do we need it anyway?

8 MR. SCHULTZ: It shows the operation of the  
9 system that is shown in photographs in the brochure.  
10 It's testimony that the jury can take a look at and  
11 actually see the operation of the system that they can  
12 only see the photographs of in the brochure.

13 We have in our responses to the invalidity  
14 contentions a paragraph that Pamela Eng will testify  
15 with respect to this issue. So there should not be  
16 any surprise.

17 THE COURT: To what issue?

18 MR. SCHULTZ: To the TV2 issue.

19 THE COURT: I mean to the video or just to  
20 the issue of what TV2 is about.

21 MR. SCHULTZ: She's just testifying -- the  
22 video is not disclosed per se in these documents. I  
23 agree with that, Your Honor. I'm just saying there's  
24 no surprise because the whole system is at issue  
25 already.

1 THE COURT: So it's really a repetition.  
2 It's a moving version of what there is in the still  
3 version; is that what you're saying?

4 MR. SCHULTZ: It's more descriptive to the  
5 jury to see what actually TV2 was at the time.

6 THE COURT: Okay. Anything else?

7 MS. ALBERT: No, Your Honor.

8 THE COURT: I think the objection is  
9 overruled on both points, Rule 26 and relevance, but  
10 I'm still reserving on the other issue subject to the  
11 brief.

12 All right. 121.

13 MS. ALBERT: Your Honor, DX 121 is one  
14 isolated chapter out of some larger document. The  
15 document is undated.

16 THE COURT: Excuse me. Where does this  
17 document come from? Do you know?

18 MS. ALBERT: It came from Lawson.

19 THE COURT: Lawson produced it. Okay.  
20 Excuse me. So it's part of something larger. Clearly  
21 it is.

22 MS. ALBERT: It doesn't indicate on its face  
23 the version of -- this relates to the purchase of  
24 what's called P.O. Writer, alleged prior art.

25 THE COURT: But it's prior art issue, and it

1 relates to the P.O. Writer. Clearly, it's part of  
2 something larger because it begins with paragraph 2.  
3 You don't know the date, is that what you said?

4 MS. ALBERT: The date is not identified. It  
5 doesn't identify on its face the version that it  
6 relates to. You can't tell whether it's even prior  
7 art or not. We have an objection under Federal Rule  
8 106 that in fairness you should have the entire  
9 document made available. Our expert did not have  
10 access to the entire document.

11 THE COURT: Are you relying on the best  
12 evidence rule? You cite it. Do you really mean that?

13 MS. ALBERT: Well, it's not the best evidence  
14 in that it's not the complete document.

15 THE COURT: So it's really a 106 objection?

16 MS. ALBERT: It is a 106 objection.

17 THE COURT: All right. Well, 102 is  
18 overruled. All right.

19 MS. STOLL-DeBELL: Your Honor, these were  
20 documents that were used in the SAP trial. If you  
21 look at them, they have SAP Bates numbers, and I  
22 believe we got them from ePlus. So that's a first  
23 response.

24 The second is that the first time we ever  
25 heard any complaint about these being incomplete is

1 when the objections to the exhibits came out. So  
2 these documents were used during the deposition of  
3 Laurene Fielder. We have deposition designations  
4 relating to them. She did give them a date. I can  
5 cite testimony for you.

6 THE COURT: What did she say the date was?

7 MS. STOLL-DeBELL: April of '93, which is the  
8 date of all of the volumes in the P.O. Writer manual.  
9 Had they raised this issue -- in fact, they used  
10 Exhibit 121 in their deposition of Ms. Fielder as  
11 their exhibit. It was Exhibit 5 during that  
12 deposition. The witness didn't say it's incomplete.  
13 They didn't say it's incomplete. It wasn't raised  
14 until it was too late.

15 THE COURT: It's incomplete on its face.

16 MS. STOLL-DeBELL: They didn't complain about  
17 it being incomplete, Your Honor. And I would further  
18 point out that Rule 106 is a rule of completeness, and  
19 the proper remedy there is if they think it's  
20 incomplete, they can introduce the rest of it. She  
21 hasn't said that the rest of it is necessary to give a  
22 full context of what this is talking about. It's not,  
23 your Honor.

24 THE COURT: I believe the rule says the  
25 adverse party may require the introduction at that

1 time. I don't think it requires them to do it. I  
2 think she can say, Pony up the rest of it, can't you?

3 MS. ALBERT: Yes. And, Your Honor,  
4 respectfully, our expert did point out in his report  
5 that this was an incomplete, undated document.

6 THE COURT: Well, you used it at the trial.

7 MS. ALBERT: We did not use it at trial.  
8 It's been used against ePlus. And, respectfully, they  
9 have had access to this. The proffering witness is  
10 their consultant, their paid consultant. They could  
11 have obtained the entire document from her. It is  
12 unduly prejudicial to us not to have the complete  
13 document. We don't know what the rest of the document  
14 says about the operation of the system.

15 THE COURT: How was it used against you in  
16 the SAP trial?

17 MS. ALBERT: Well --

18 THE COURT: And how did it hurt you?

19 MR. ROBERTSON: It was offered as a  
20 defendant's exhibit, Your Honor. Judge Spencer didn't  
21 go through an exercise that we're enjoying here today.  
22 He basically admitted 99 percent of the exhibits.

23 THE COURT: You enjoy that better than this?  
24 Is that what you're saying?

25 MR. ROBERTSON: It was never challenged. I



1 don't even know if it was introduced or discussed with  
2 the witness at the trial. The exhibits came in.  
3 That's where we are on that.

4 I think asking a question at a deposition  
5 about an exhibit doesn't preclude you from challenging  
6 it later based on Federal Rules of Evidence.

7 I did want to clarify one thing for my  
8 colleague because I was at the deposition. Ms.  
9 McEneny is not one of the paid witnesses by Lawson.  
10 She was cooperating and working with Lawson, and they  
11 could have asked her. There's lots of communications  
12 back and forth, but I didn't want to leave you with  
13 that impression. She obviously misspoke.

14 THE COURT: All right.

15 MS. ALBERT: But she was their witness. They  
16 are offering her deposition testimony at trial.

17 THE COURT: Okay.

18 MS. STOLL-DeBELL: I'm sorry. It was their  
19 deposition of her. They brought that document. They  
20 used it as an exhibit. We don't have the rest. I  
21 have a Fourth Circuit case here, Your Honor, which  
22 talks about when there isn't the rest. And in this  
23 Fourth Circuit case, the rest was destroyed. The  
24 court allowed it in because neither party was  
25 responsible.

1 THE COURT: The proof of record was that it  
2 was destroyed. There wasn't any more.

3 MS. STOLL-DeBELL: That's true. We're  
4 talking about a manual that's dated 1993. If we had  
5 it, we would have put it in. We don't. But what we  
6 do have is complete. It was used in the SAP trial.

7 THE COURT: Whose manual is it?

8 MS. STOLL-DeBELL: It's P.O. Writer.

9 THE COURT: Who owns P.O. Writer?

10 MS. STOLL-DeBELL: American Tech. Something  
11 like that.

12 THE COURT: Did you ask them for it?

13 MS. STOLL-DeBELL: I believe we got what was  
14 from the SAP trial. We did. It's my understanding we  
15 did ask for it. We have what we could get. It's a  
16 very old document, and I don't think that --

17 THE COURT: In other words, do you bring  
18 it within -- I don't remember the name of the Fourth  
19 Circuit case, but there's a case that says, and I  
20 think maybe more than one, it basically says if the  
21 record shows that it's not possible to satisfy the  
22 rule of completeness, then you can let it in and let  
23 testimony take care of the validity *vel non* of it as  
24 to its reliability. Isn't that essentially what that  
25 case said?

1 MS. STOLL-DeBELL: It is. It says, Rule 106  
2 is for adding additional things. I can give you the  
3 cite. It's United States v. Ferguson.

4 THE COURT: Yes. But my question is: What  
5 record do you have to tell me that you can't get the  
6 rest of the document?

7 MS. STOLL-DeBELL: It's my understanding,  
8 Your Honor, that we did ask American Tech for it. And  
9 I would further point out that they did not complain  
10 about it. Had they come back and said at any point,  
11 "This isn't complete," then we would have known it was  
12 an issue. Now we're before trial and it's too late  
13 for us to do anything about it.

14 THE COURT: Well, that isn't really a  
15 pertinent point, I don't think, Ms. Stoll-DeBell.  
16 They weren't using it. If you were going to use it,  
17 it's your responsibility to recognize it's part of the  
18 document. In fact, they asked about it in a  
19 deposition, but it doesn't keep them from objecting to  
20 it here.

21 MS. STOLL-DeBELL: Your Honor, they haven't  
22 even alleged that the remaining chapters would make  
23 any difference at all anyway. Chapter 2 was a  
24 tutorial about the entire software system. That's DX  
25 122. It goes through the purposes to show people who

1 are buying this how to use it. That in itself is  
2 complete. It is the tutorial. That's what  
3 Ms. Fielder said during her deposition.

4 MS. ALBERT: The fact that we don't know what  
5 we don't know --

6 THE COURT: Can't be used against you.

7 MS. ALBERT: Right. If our expert doesn't  
8 have --

9 THE COURT: Leave that one alone.

10 MS. ALBERT: -- the complete document.

11 THE COURT: You can leave that one alone. I  
12 understand the point.

13 You say this witness provided the date for  
14 it?

15 MS. STOLL-DeBELL: Yes, Your Honor. She was  
16 very clear. There are different volumes of this P.O.  
17 Writer manual. The whole thing is actually quite big.  
18 So we have just put into evidence sections that we  
19 believe are relevant to the claims. She very clearly  
20 in her deposition gave a '93 date for every single  
21 volume of these manuals.

22 MS. ALBERT: Without having a date on its  
23 face, how can you corroborate or cross-examine her  
24 knowledge of something? She's saying now 17 or so  
25 years later after the fact that she thinks this is

1 from 1993, but there's no date anywhere on the  
2 document, and it's being used to invalidate our  
3 patents. They should have a higher burden to show  
4 that something is prior art.

5 THE COURT: Excuse me. I thought you said  
6 she was pregnant in the film.

7 MS. STOLL-DeBELL: No, Your Honor.

8 THE COURT: That's the other one.

9 MS. STOLL-DeBELL: That was Ms. Eng and that  
10 was TV2.

11 THE COURT: I'm sorry.

12 MS. STOLL-DeBELL: We're talking about Ms.  
13 Fielder and P.O. Writer.

14 Let me first say that Ms. Albert keeps  
15 talking about this corroboration requirement. That is  
16 this rule in patent law that you cannot invalidate  
17 claims based upon the oral testimony of a single  
18 witness. We're not talking about that here. We have  
19 Ms. Fielder and we have thousands of pages of manuals,  
20 most of which have this 1993 date on it. It happens  
21 that this doesn't, but she remembers clearly and  
22 testified under oath that they were all released at  
23 the same time. They all were released in whatever,  
24 April of 1993. So she's testified under oath she  
25 remembers. She testified in the SAP trial.

1 THE COURT: What is the objection column  
2 "I-N-A-C-C" mean?

3 MS. ALBERT: Inaccurate description.

4 THE COURT: Of the document?

5 MS. ALBERT: Yes. We don't agree that it's  
6 Version 10 because there's nowhere on the document on  
7 the face of it that says it's a Version 10 document.

8 And, respectfully, what my colleague is  
9 trying to do is bootstrap by oral testimony an  
10 undated, incomplete document and trying to corroborate  
11 it as prior art with naked oral testimony of a witness  
12 17 years after the fact. That is not sufficient under  
13 the law.

14 MS. STOLL-DeBELL: Your Honor, she testified  
15 that this was for Version 10, this document, and it  
16 was dated April of '93. She said, Yes, I recognize  
17 these pages from the purchasing manual at that point  
18 in time.

19 And the question was: "Now, when you say 'at  
20 that point in time' what are you referring to?"

21 Her answer is: "Spring of '93."

22 "Question: Is that referring to Version 10  
23 of the P.O. Writer Plus software?"

24 She answers, "That's correct. This  
25 specifically would be relating to the purchasing

1 module."

2 Also I'm looking at the --

3 THE COURT: How can she remember that it was  
4 1993 spring?

5 MS. STOLL-DeBELL: Because all of these  
6 things go together. They were one big manual.

7 THE COURT: All of what things?

8 MS. STOLL-DeBELL: All of the P.O. Writer  
9 volumes, many of which are stipulated and in evidence  
10 now. So they had a software program that was broken  
11 into different modules and you could purchase  
12 different modules.

13 THE COURT: Are you saying there's other  
14 documents from which she looked at and said, "I can  
15 tell from them that this is a 1993 document"?

16 MS. STOLL-DeBELL: She was saying, This is  
17 part of the Version 10 software manual, yes. This is  
18 the purchasing module for that manual. It's Version  
19 10. It's dated April of '93 just like all of the  
20 other volumes of the Version 10 software were dated  
21 April of '93.

22 THE COURT: All right.

23 MS. ALBERT: The witness testified that they  
24 released versions regularly, like once a year. And we  
25 have no way to tell whether this is from a chapter

1 from a Version 10 manual or a chapter from a later  
2 version that's not prior art to the patents-in-suit.

3 And, moreover, I still maintain our objection  
4 that it's an incomplete document. And if we had had  
5 the complete document, there may be other portions in  
6 there that would actually be inconsistent with the  
7 invalidity contentions that Lawson is putting forth  
8 here.

9 THE COURT: I'm going to reserve the judgment  
10 until I hear the testimony about the foundation as to  
11 the date because I think that it is a problem, and  
12 it's hard to understand from what you-all are saying  
13 exactly how she can date it, but that's a critical  
14 issue here, particularly given what date she says it  
15 is.

16 All right. 122.

17 MS. ALBERT: DX 122, if you can turn to the  
18 second page of the exhibit, which is L0126502, it  
19 indicates that this exhibit should have five chapters  
20 and two appendices. And it, clearly, on its face does  
21 not have five chapters and two appendices. It's just  
22 Chapter 1. And we don't have the rest of the  
23 document. So we have a Rule 106 objection, and also  
24 we object on the basis of Rule 403 that it's unduly  
25 prejudicial because they're trying to rely on it as



1 prior art to invalidate our claims, and we don't have  
2 the full document to explain the functionality of the  
3 product.

4 THE COURT: Do we know the date of it?

5 MS. STOLL-DeBELL: Yes, Your Honor. The date  
6 is on the front page of Exhibit 122. And this is a  
7 good example of how she knows that the date of 121 is  
8 April of '93 because this is the first chapter of the  
9 purchasing manual. And it says Chapter 2 is the  
10 tutorial. You'll see it says April of '93. And  
11 Exhibit DX 121 is Chapter 2. So right there you can  
12 connect these documents up and see that the date of  
13 Exhibit 121 is April of '93.

14 MS. ALBERT: These documents do not get  
15 connected because the Bates numbers are not in order.

16 THE COURT: Well, doesn't the text tell us --

17 MS. ALBERT: I still don't know if Chapter 2  
18 in DX 121 is from a later version of P.O. Writer than  
19 the version they're trying to rely on. There's no  
20 indication on the face of DX 121 whether it relates to  
21 Version 10 that they rely on for their invalidity  
22 contentions or whether it relates to a later version.  
23 And the witness did testify that they had versions  
24 every year including subsequent versions.

25 MS. STOLL-DeBELL: But she also testified,

1 Your Honor, that this is Version 10. It seems to me  
2 that this is something that should go to the jury as a  
3 question of fact. She said under oath --

4 THE COURT: Excuse me. On DX 122 it says,  
5 Software Revision 10.0.

6 MS. ALBERT: I know. I don't contend that DX  
7 122 is not from Version 10. What I contend on DX 122  
8 is that on the face of the document itself it's  
9 supposed to have five chapters and two appendices, and  
10 it only includes Chapter 1.

11 THE COURT: What parts of the index suggest  
12 to you that there might be something pertinent about  
13 the functionality that's at issue here in the missing  
14 sections?

15 MS. ALBERT: Well, Chapter 3 relates to  
16 implementing P.O. Writer Plus. Chapter 4 relates to  
17 using P.O. Writer Plus purchasing manual. That's  
18 directly in issue.

19 MS. STOLL-DeBELL: Your Honor, first of all,  
20 we have a subpoena to Ms. Fielder. We tried to get  
21 the documents that she had. She didn't have it. It  
22 doesn't exist anymore. It's very old. That should  
23 not mean that this whole thing should be excluded.  
24 And I would further point out that this is prior art,  
25 and we need to show that this system has all the

1 features of their claim.

2 So if there's additional chapters like  
3 Chapter 3, it would only help us because it may give  
4 additional detail to the arguments that we're making.

5 THE COURT: It might hurt you, too. You  
6 never know. You can't ever say that what's not there  
7 is going to help you because you never know what's  
8 there, and it could just as well hurt you. You can't  
9 do that.

10 I'm going to hear her testimony. She's going  
11 to come testify?

12 MS. STOLL-DeBELL: She's a deposition  
13 designation, Your Honor.

14 THE COURT: I'll read it and see. You show  
15 me where it is and I will look at it and see.

16 MS. STOLL-DeBELL: Okay.

17 THE COURT: But I'm disinclined to allow it,  
18 but I need to read it. So she's not coming to  
19 testify. It's all in the deposition.

20 MS. STOLL-DeBELL: Yes.

21 THE COURT: You need to give me the  
22 deposition with the pages where she establishes the  
23 foundation of both these documents.

24 MS. STOLL-DeBELL: We will, Your Honor.

25 MS. ALBERT: But that still won't address the

1 issue of the incompleteness of the document.

2 THE COURT: It may or may not.

3 All right. 123.

4 MS. ALBERT: I believe Lawson withdrew that  
5 exhibit.

6 MS. STOLL-DeBELL: I believe we did too, Your  
7 Honor.

8 THE COURT: All right.

9 MS. STOLL-DeBELL: We withdraw 124, too, Your  
10 Honor.

11 THE COURT: Withdrawn on what? It's not on  
12 there. Next one I've got is 136.

13 MS. ALBERT: 136 and 139.

14 THE COURT: By the way, you need to take out  
15 the things you have withdrawn from your exhibit books  
16 when you get them at trial. I still have 124 in mine  
17 even though you withdrew it, but it's not on the list.  
18 Just have somebody go back and check through to get  
19 ready. That's one of the little things you do.

20 Okay. 136.

21 MS. ALBERT: 136 and 139 are the same issues.  
22 Dr. Shamos -- they don't rely on either of those  
23 manuals for any invalidity theory. So our objection  
24 is based on Rule 401 and 402.

25 THE COURT: What does this have to do with,

1 Ms. Stoll-DeBell, if you don't rely on it for any  
2 invalidity theory? 136 and 139.

3 MS. STOLL-DeBELL: We did cite the entire  
4 P.O. Writer manual including these in our second  
5 supplemental invalidity contentions, and it was listed  
6 in Dr. Shamos' report as a document considered.

7 As far as 136 goes, that is a manual talking  
8 all about the stuff that's at issue in this suit.  
9 Requisitions --

10 THE COURT: What does the man testify about?  
11 Shamos.

12 MS. STOLL-DeBELL: He didn't have any  
13 specific cites to this document in his report. He  
14 listed it as a document considered.

15 THE COURT: Well, did he consider it and  
16 reject or consider it and didn't comment on it or  
17 what?

18 MS. STOLL-DeBELL: He considered it and  
19 didn't comment on it.

20 THE COURT: So we don't have a sponsor for  
21 it. There is no way a jury can figure out what this  
22 means. So without a foundation, there's no way to use  
23 136.

24 MS. STOLL-DeBELL: We do have a foundation.  
25 Ms. Fielder testified about it in her deposition. She

1 authenticated it.

2 THE COURT: But if nobody is going to testify  
3 about it and explain what it is in your invalidity  
4 theory, why does it even come in? It just confuses  
5 the jury to have a bunch of paper that they can't  
6 understand. They can't understand this.

7 MS. STOLL-DeBELL: Well, I think it's just  
8 additional support. Dr. Shamos talked about how P.O.  
9 Writer does requisitions from catalogs, for example.  
10 This is just a manual that says the same thing. I  
11 mean, he cited one of the other P.O. Writer manuals.

12 It's our position he can talk about it. It  
13 was listed in his report. What he will say about it  
14 is all disclosed in his report.

15 THE COURT: What does he say about it?  
16 That's the point. If he said something about it, then  
17 it can come in. If he didn't, it's not going to come  
18 in.

19 MS. STOLL-DeBELL: He didn't cite to this  
20 specific manual.

21 THE COURT: Okay. But he did to 139, right?

22 MS. STOLL-DeBELL: No. 139 is more just to  
23 give a date on P.O. Writer. It was the upgrade kit  
24 that was used by P.O. Writer users to go from Version  
25 9 to Version 10. Ms. Fielder talked about that.

1 THE COURT: What did he say about 136,  
2 Shamos?

3 MS. STOLL-DeBELL: He cited it as a document  
4 considered.

5 THE COURT: Okay. It made it among the list  
6 of documents considered, but he didn't give any  
7 opinion about it. So he can't testify at trial about  
8 it because he didn't give an opinion about it in his  
9 report.

10 Objection sustained as to 136.

11 139.

12 MS. STOLL-DeBELL: It really just goes to the  
13 date of P.O. Writer. I don't imagine that Dr. Shamos  
14 will testify about this. It was used to go from  
15 Version 9 to Version 10. That's what Ms. Fielder says  
16 about it.

17 THE COURT: Well, then it's pertinent to the  
18 extent that her testimony on 111 and 112 --

19 MS. STOLL-DeBELL: We're not going to use  
20 Dr. Shamos to give the date. That's coming in through  
21 Ms. Fielder and these documents. He is assuming it's  
22 prior art in talking about why it meets the claim  
23 element.

24 MS. ALBERT: It's not relied on for any  
25 invalidity theory. It's just going to confuse the

1 jury to have another extensive manual in the record  
2 that's not relevant to any of the functionality that's  
3 relied on for their invalidity contention.

4 THE COURT: Nobody is going to explain what  
5 this thing is?

6 MS. STOLL-DeBELL: Yes, Ms. Fielder explains  
7 what it is in her deposition.

8 THE COURT: I'll consider it along with 111  
9 and 112.

10 291.

11 MR. STRAPP: Your Honor, 291 is a document  
12 from 2001. It's an ePlus document. It was created by  
13 ePlus after it had purchased the assets of a company  
14 called ProcureNet. ProcureNet was the company that  
15 had the assets, among which were the patents that are  
16 now asserted in this litigation.

17 And the evidence that's going to be put on at  
18 trial will show that ePlus needed for accounting  
19 reasons to allocate the purchase price that it had  
20 paid for ProcureNet over all the assets that it had  
21 purchased from ProcureNet. It didn't purchase the  
22 entire company. It only purchased certain assets of  
23 ProcureNet.

24 Furthermore, the evidence will show with  
25 respect to this document that when ePlus was valuing



1 the patents that it had purchased from ProcureNet,  
2 there was no attempt made by ePlus to assess the  
3 intrinsic value of the patents, and that instead when  
4 ePlus valued the patents in the context of this  
5 document, the valuation was simply done by assigning  
6 the administrative costs involved in transferring  
7 ownership rights from ProcureNet to ePlus.

8 We'll also put on evidence to show --

9 THE COURT: What does all this have to do  
10 with it?

11 MR. STRAPP: Well, I think that the reason I  
12 point that out, Your Honor, is that in this document  
13 there's a figure of \$12,000 given, and it's my  
14 understanding that Lawson would like to introduce this  
15 document to argue to the jury that these patents are  
16 worth \$12,000.

17 THE COURT: What's that got to do with  
18 anything?

19 MS. STOLL-DeBELL: Your Honor, we've heard  
20 all day today about how relevant procurement is, and  
21 all of their products, and how great their patents  
22 are, and licensees are paying \$37 million for them,  
23 and they are commercially successful, and they are  
24 wonderful.

25 ePlus valued those patents at \$12,000, and

1 they are bringing all of this commercial success  
2 evidence in, and we have the right to rebut that and  
3 say, You valued these patents for \$12,000. So they  
4 are not commercially successful.

5 THE COURT: That's when you bought them.  
6 It's what happened after that that counts for the  
7 commercial success, isn't it?

8 MS. STOLL-DeBELL: No. They start all the  
9 way at Fisher in 1994, and they rely on Fisher.

10 THE COURT: When did they buy ProcureNet? In  
11 other words, you buy a dog, and the dog gets valuable  
12 right after you buy it because of something you do.  
13 Then that shows that it's commercially successful from  
14 X date.

15 MS. STOLL-DeBELL: But they contend that even  
16 today that before that date, they were successful.  
17 Fisher won awards. We saw all take cornerstone stuff  
18 they are going to break up.

19 THE COURT: Is that ProcureNet?

20 MS. STOLL-DeBELL: Yes.

21 THE COURT: Fisher is ProcureNet?

22 MS. STOLL-DeBELL: Yes. So it's my  
23 understanding that it went Fisher, ProcureNet, ePlus.

24 THE COURT: But the same invention?

25 MS. STOLL-DeBELL: I think they would say

1 yes.

2 THE COURT: Yes. You don't agreed, but  
3 that's what their theory is.

4 MS. STOLL-DeBELL: I believe that's their  
5 theory.

6 So they talk about commercial success all  
7 along including before this timeframe.

8 THE COURT: So why isn't it admissible to  
9 rebut your case on commercial success?

10 MR. STRAPP: Well, Your Honor --

11 THE COURT: How does it come in? How are you  
12 going to get it in, Ms. Stoll-DeBell?

13 MS. STOLL-DeBELL: Mr. Farber. He was there.  
14 He testified about it in his deposition. We asked him  
15 about it, and we're going to use it with him, and he  
16 can talk about it.

17 THE COURT: All right. Okay.

18 Excuse me. Go ahead.

19 MR. STRAPP: Your Honor, we understand what  
20 they want to do with this document is to suggest that  
21 this patent wasn't commercially successful because it  
22 was valued -- the administrative cost of transfer of  
23 ownership is valued at \$12,000. And, respectfully,  
24 we'd be willing to withdraw our objection. We'll put  
25 it on through Mr. Farber, and he'll explain what this

1 document is about. He'll also explain after the  
2 fact --

3 THE COURT: So did you withdraw your  
4 objection? I don't need to rule on it?

5 MR. STRAPP: Yes, we will withdraw our  
6 objection.

7 THE COURT: Okay. That's good because I was  
8 going to overrule it anyway. So you did well.

9 All right. 371. What's this? The English  
10 Dictionary?

11 MS. STOLL-DeBELL: I can talk about this,  
12 Your Honor.

13 MR. ROBERTSON: It's our objection, if you  
14 don't mind.

15 MS. STOLL-DeBELL: Sure. Go ahead,  
16 Mr. Robertson.

17 MR. ROBERTSON: Thank you.

18 THE COURT: Well, it's got him to his feet,  
19 too. Holy mackerel. This must be a hot ticket.

20 MR. ROBERTSON: I can just stretch my legs is  
21 what I'm hoping to do.

22 Yes, Your Honor. Apparently, Lawson wants to  
23 offer into evidence --

24 THE COURT: What?

25 MR. ROBERTSON: Apparently, Lawson wants to

1 offer into evidence an excerpt from the Compact Oxford  
2 English Dictionary on the term "published." And from  
3 what I can understand from this, the suggestion is  
4 that Your Honor may recall that in your Markman  
5 ruling, you construed the term "catalog" back in  
6 February, I believe it was, after two days of hearing  
7 on this. And at the time when Lawson was arguing that  
8 a catalog has to be published by a vendor we had a  
9 discussion because I suggested to the Court that that  
10 was going to be rife with mischief and that that was  
11 going to turn into a non-infringement argument at the  
12 time.

13 And I don't think you will recall this, but  
14 you then went on to say that if you discover that the  
15 suggestion in that catalog was some sort of gotcha for  
16 a non-infringement argument. At the time you said in  
17 the context of a summary judgment, but they didn't  
18 move for summary judgment on it. But now what they've  
19 done or what they're trying to do is actually  
20 introduce a dictionary definition.

21 Why they selected this one dictionary when  
22 there are hundreds of dictionaries out there that have  
23 "published" I assume is because they like the  
24 definition. But I gather they are trying to suggest  
25 that they get a construction of the Court's

1 construction by importing now into it a further  
2 discussion of what "published" is.

3 I'm not even certain since it goes on for  
4 quite awhile exactly what it is, even in the excerpted  
5 version. But what we have run into now, Your Honor,  
6 with this, what I think is a gotcha, is all sorts of  
7 suggestions --

8 THE COURT: What's this last page here?

9 MR. ROBERTSON: I think that's --

10 THE COURT: That looks like something from  
11 Beowulf or something.

12 MR. ROBERTSON: I assume that that's the  
13 excerpt that they want to get to the jury. So,  
14 obviously, it's hearsay. Obviously, it's been  
15 cherry-picked. Clearly, it's inappropriate to use a  
16 dictionary definition with the jury to construe a  
17 court's construction, which is a matter of law.

18 It should be irrelevant. It should be  
19 hearsay. They should not be able to just select the  
20 ones that they want. But more importantly, Your  
21 Honor, and this is an issue I want to raise with you,  
22 they are now arguing that the construction published  
23 by a vendor that they urge the Court to import into  
24 catalog is their non-infringement position, and they  
25 have even gone so far as to suggest when

1 cross-examining our experts that we'll never know when  
2 the item information that is maintained in the  
3 database is published by a vendor. We cannot possibly  
4 know it. Therefore, it's insolubly indefinite.

5 So they argue for you to import this term and  
6 suggest that this was the correct construction, and  
7 now they're arguing either, We'll never know if it's  
8 infringed or it renders the claim so insolubly  
9 ambiguous it's indefinite.

10 Now, this was exactly the gotcha, Your Honor,  
11 that I was suggesting that was being -- that was  
12 occurring that day. And I think it's inappropriate.  
13 The construction doesn't need a construction. And  
14 certainly they shouldn't be able to rely on a hearsay  
15 document that they've cherry-picked from dozens of  
16 things to urge a construction on the Court's  
17 construction. It's totally inappropriate under the  
18 law. So we have a relevancy objection, too.

19 Now, I think this is so important, Your  
20 Honor, that it's going to come up during the course of  
21 the trial. I would like to be able to address this  
22 and be able to show you where this is now being used  
23 to try and manufacture invalidity and non-infringement  
24 arguments that the Court never anticipated, but I was  
25 wary about at that time.

1           With respect to this specific exhibit, I  
2       would respectfully request that the objection be  
3       sustained. There's no basis for them to be arguing to  
4       the jury on the basis of a dictionary definition when  
5       the Court has already construed the claim.

6           And I would also suggest, Your Honor, that if  
7       this starts to come up, I would like to address this  
8       in briefing for Your Honor, that it would be  
9       inappropriate to urge a construction on the Court and  
10      then argue, Hey, we caught you. Now it's ambiguous or  
11      now you can never prove it's infringed.

12           It has its simple meaning, which I think the  
13      Court must understand is you're getting the  
14      information from a vendor. You're getting something  
15      like an item ID number or you're getting pricing  
16      information, which will be what the evidence is, but  
17      it never meant, and the Court's construction couldn't  
18      be fairly read to mean that I have to import a CD ROM  
19      that loads all the pictures in there or loads all the  
20      information, and that's the only way it would be  
21      published.

22           THE COURT: You're published now, aren't you?

23           MR. ROBERTSON: Publishing?

24           THE COURT: Right now.

25           MR. ROBERTSON: By providing you with



1 information?

2 THE COURT: Yes. You just published all your  
3 thoughts.

4 MR. ROBERTSON: You know, Your Honor, I think  
5 that's essentially what we want. I don't think it has  
6 to have all the baggage they're now suggesting it  
7 means. So I certainly don't think we need a  
8 construction of a construction.

9 THE COURT: Well, that's what they say.  
10 "Made generally known, publicly announced or  
11 declared."

12 MR. ROBERTSON: Why would we need a further  
13 construction of a construction? Remember, the Court  
14 already ruled on a motion in limine.

15 THE COURT: You can call a vendor, and the  
16 vendor can give you the answer, and he can publish the  
17 answer to you over the telephone.

18 MR. ROBERTSON: I think that's exactly right,  
19 Your Honor. It could be published in a variety of  
20 ways.

21 THE COURT: It can be published really only  
22 two ways.

23 MR. ROBERTSON: How is that, sir?

24 THE COURT: In writing or verbally. It can  
25 be in writing electronically or on paper. How many

1 other ways of publishing are there?

2 MR. ROBERTSON: I can't think of any right  
3 now, Your Honor, but I have seen the arguments as to  
4 what they think that word has, and it's more than just  
5 providing information or disseminating information.

6 With respect to this one exhibit, Your Honor,  
7 I certainly don't think it should go back to the jury  
8 so they can sit there and figure out how to construe  
9 the Court's construction. That is a matter purely for  
10 the Court.

11 MS. STOLL-DeBELL: Let me start off by saying  
12 we intend to use this for impeachment of Dr. Weaver  
13 who has a tortured definition of "publish."

14 THE COURT: What is his definition?

15 MS. STOLL-DeBELL: He says "publish" means  
16 originate. So if I write a book and don't show it to  
17 anyone, he would say that's published by me even if I  
18 didn't send it to a publishing house and publicly  
19 disseminate it.

20 So I used this definition in his deposition  
21 to challenge his view of what "published" means.

22 THE COURT: That "published" means originate?

23 MS. STOLL-DeBELL: Yes.

24 THE COURT: You're going to have a lot of fun  
25 with him, aren't you?

1 MS. STOLL-DeBELL: I don't think so, yes,  
2 Your Honor. But we don't intend to send this back to  
3 the jury. It's impeachment. We can withdraw it.

4 THE COURT: That would be a good thing.

5 MS. STOLL DeBELL: We're not claiming the  
6 claim is indefinite for the word "catalog" either. I  
7 wasn't following what his argument was.

8 THE COURT: Were you working on a gotcha?

9 MS. STOLL-DeBELL: To the extent that I'm  
10 trying to win this case, Your Honor, yes, I intend to  
11 --

12 THE COURT: The exhibit is withdrawn.  
13 That takes care of all your exhibits, right?

14 MS. STOLL-DeBELL: Yes.

15 THE COURT: What else is left to do here so  
16 we can decide how we're going to handle things  
17 tomorrow?

18 MR. ROBERTSON: A couple housekeeping matters  
19 I'd like to address tomorrow, Your Honor, but we have  
20 the depositions. I think some time well spent would  
21 be -- we've had some discussions about perhaps just  
22 having the Court rule --

23 THE COURT: About what?

24 MR. ROBERTSON: Just having the Court rule on  
25 papers that have been submitted with some of the

1 objections to the deposition testimony. I think there  
2 are --

3 THE COURT: Did you do what I told you to do,  
4 which is give me a marked transcript that has them?

5 MR. ROBERTSON: Yes, sir.

6 THE COURT: We're going to sit down and go  
7 through the objections tomorrow. If I have to do it,  
8 you have to do it.

9 MR. ROBERTSON: That's fair enough, Your  
10 Honor.

11 There were some other issues I'd like to  
12 raise with you, housekeeping matters, tomorrow, but  
13 one of the things that Mr. McDonald asked me to do  
14 during one of the recesses was to make a  
15 representation to the Court that to the best of our  
16 knowledge this document we handed up to you today,  
17 this outline of Lawson's objections to ePlus'  
18 exhibits, which we created, it faithfully incorporated  
19 all of Lawson's objections.

20 We believe it does. We've had some time to  
21 try and check and confirm, but I told Mr. McDonald  
22 that if we omitted one of their objections to our  
23 exhibits, that I would meet with him and try to  
24 resolve it, and if not, we'll bring it promptly to the  
25 Court's attention.

1 THE COURT: That will be fine. We're dealing  
2 with a lot of things. If we have a problem, we'll  
3 deal with them.

4 You-all need to come get your book of  
5 exhibits. These belong to Ms. Stoll-DeBell. Leave my  
6 stuff right here on my desk if you will.

7 We will see you-all in the morning at 11.

8 MR. ROBERTSON: You said 9:30, Your Honor.

9 THE COURT: 9:30 is a criminal matter. Would  
10 you like to come over for that?

11 All right.

12

13 (The proceedings were adjourned at 5:31 a.m.)

14

15 I, P.E. Peterson, certify that the foregoing  
16 is a true and accurate transcription of my  
17 stenographic notes.

18 /s/ 10/04/10

19 P.E. PETERSON, RPR, CCR DATE

20

21 I, Diane J. Daffron, certify that the  
22 foregoing is a true and accurate transcription of my  
23 stenographic notes.

24 /s/ 10/04/10

25 DIANE J. DAFFRON, RPR, CCR DATE